IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2792 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KANKUBEN CHHAGANBHAI VANKAR

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 2792 of 1999

MR PK Shukla for Petitioner No. 1

Mr. ND Gohil, AGP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 10/09/2003

ORAL JUDGEMENT

Heard learned advocate Mr. P.K. Shukla for the petitioner and Mr. N.D. Gohil, the learned AGP for the respondents. The case of the petitioner in this petition

is to the effect that her husband late Shri Chhaganbhai Dhulabhai passed away on 1.9.1998. The petitioner applied for family pension benefits vide her application dated 9.3.1999 The present respondents vide letter dated 15.3.1999 denied the benefits on the ground that her husband late Chhaganhai has not put up 10 years of service. It is the case of the petitioner that her husband had joined the service on 26.8.1982 and his services were terminated on 27.9.1984 and the labour court vide award dated 16.6.1994, ordered for reisntatement of her husband Chhaganbhai with 50 per cent of the back wages for the intervening period. According to the petitioner, under such circumstances, Chhaganbhai had put in 10 years of service and therefore, she is entitled for family pension after the death of her husband. The petitioner has, therefore, approached this court by way of this petition. According to the petitioner, she applied for family pension as her husband has put in more than 10 years qualifying service as per the Government Resolution dated 17.10.1988.

Reply to the present petition has been filed by the respondents. In para 3 of the said reply, it has been averred that in fact, the husband of the petitioner was employed as a daily wager and he served as a watchman from 26.8.1982 and that her husband served from 26.8.82 to 26.9.84. According to the respondents as per the said affidavit in reply, her husband worked for 42 days from 26.8.82 to 27.12.82; he worked for 174 days from March, 1983 to 24.12.1983; 175 days from 25.12.1983 to 26.9.1984 and due to misbehaviour with the section officer on the site and irregularities, he was punished and relieved from service and was not called back after 27.9.1984. According to the respondents, husband of the present petitioner approached the labour court in the year 1984 for reinstatement with all benefits and in the said reference made at the instance of her husband, an award of reinstatement with 50 per cent of the back wages was passed by the labour court which award was challenged by her husband qua back wages by filing special civil application no. 12064 of 1994. According to the respondents, husband of the petitioner was reinstated with effect from 11.11.1994 and as per the GR dated 17.10.1988, he is required to have completed 10 years qualifying service which the husband of the petitioner was not completing as stated above and, therefore, the petitioner is not entitled to claim family pension as per GR dated 17.10.1988.

I have considered the submissions made by the learned advocates for the parties. Considering the GR

dated 17.10.1988, 10 years service is necessary for becoming entitled for pensionary benefits and the same is required to be satisfied by the workman. While examining the present case, date and details of service record of the late husband of the petitioner given by the respondent is required to be examined. It is the case of the respondents that the petitioner is not entitled to claim and receive the family pension after the death of her husband because the husband of the petitioner was not completing 10 years qualifying service which is the condition precedent for entitlement of pension or family pension as the case may be. According to the respondents, husband of the petitioner was employed as a daily wager and he served as a watchman from 26.8.1982 and that her husband served from 26.8.82 to 26.9.84. According to the respondents as per the said affidavit in reply, her husband worked for 42 days from 26.8.82 to 27.12.82; he worked for 174 days from March, 1983 to 24.12.1983; 175 days from 25.12.1983 to 26.9.1984 and due to misbehaviour with the section officer on the site and irregularities, he was punished and relieved from service and was not called back after 27.9.1984. According to the respondents, husband of the present petitioner approached the labour court in the year 1984 for reinstatement with all benefits and in the said reference made at the instance of her husband, an award of reinstatement with 50 per cent of the back wages was passed by the labour court which award was challenged by her husband qua back wages by filing special civil application no. 12064 of 1994. According to the respondents, husband of the petitioner was reinstated with effect from 11.11.1994. Thus, the respondents are considering the actual service rendered by the petitioner's husband prior to the termination of his services and after he was reinstated in service on 11.11.1994 till the date of his retirement and on that basis, are calculating the service rendered by the husband of the petitioner and are alleging that he is not completing 10 years service as required under GR dated 17.10.1988 and, therefore, the petitioner is not entitled for family pension. The husband of the petitioner retired on 31st August, 1998. In the reference proceedings before the labour court, husband of the petitioner was reinstated in service with 50 per cent of the back wages for the intervening period. Therefore, if the intervening period is taken into consideration while considering the qualifying service so as to consider the entitlement of the petitioner for family pension, it would appear that the husband of the petitioner is qualifying more than sixteen years of service entitling the petitioner to claim and receive the family pension as

per the GR dated 17.10.1988. Therefore, the contention of the respondents that on 1st October, 1988, the petitioner was not in service is not correct because the GR dated 17.10.1988 is not specifying that the daily wagers those who are not in service on 1st October, 1988 are not entitled for such benefits flowing from the said Resolution. Even otherwise, considering the award of reinstatement made by the labour court in Reference No. 270 of 1985 dated 16th June, 1994 wherein the respondents were directed to reinstate the husband of the petitioner with 50 per cent of the back wages for the intervening period, the respondents are required to consider that the husband of the petitioner was in service for the intervening period and if that is considered as service rendered by him, then, the contention of the respondents that her husband was not in service on 1.10.1988 and, therefore, he is not entitled for such benefits is redundant. It is also not the case of the respondents that for the period from 1982 to 1984 till the date of termination of the services of her husband, her husband was not in continuous service from the date of joining till the date of termination of his services. Considering this aspect and also considering the another aspect as stated earlier that the termination order was set aside by the labour court and the husband of the petitioner was reinstated in service by award dated 16.6.1994 with 50 per cent of the back wages for the intervening period, it is clear that save and except the denial of 50 per cent back wages, the husband of the petitioner was ordered to be reinstated with all consequential benefits save and except the denial of 50 per cent back wages and the reinstatement includes continuity of service because it was not a case of reemployment. Further, it is also required to be considered that while granting the reinstatement, 50 per cent of the back wages was granted for the entire intervening period and in view of that, the respondents are required to consider that the husband of the petitioner was deemed to be in service for all purpose save and except 50 per cent back wages for that period which were specifically denied by the respondents. It should be considered that the continuity of service has not been specifically denied by the labour court while granting reinstatement and awarding 50 per cent back wages for the intervening period. In view of this factual position, the contention raised by the respondents cannot be accepted.

This aspect has earlier been examined by this Court in the matter case of Vasantika R. Dalia versus Baroda Municipal Corporation reported in 1998 - I CLR 32.

In para 2 of the said judgment, it has been observed by this Court as under :

"2. The present petitioner workman had also filed Special Civil Application NO. 5497 of 1998 contesting for the back wages and consequential reliefs and, thus, Special Civil Application filed by the workman was dismissed and the notice was discharged. The award dated 28.3.1988 as aforesaid thus attained the finality. It appears that this award dated 28.3.1988 granting relief of reinstatement to the workman was not implemented by the respondent corporation and, therefore, a miscellaneous civil application no. 655 of 1988 in the nature of contempt application had been filed by the petitioner workman and thus Misc. Civil Application No. 655 of 1988 was decided by the Division Bench while noticing the statement of learned Counsel Mr. P.G. Desai for the respondent that it had complied with the direction given by the Labour Court in as much as the petitioner has been reinstated in service.The Division Bench has also observed that there was some delay in reinstating the petitioner on the original post and, therefore, the statement of Mr. Desai was also noted that the wages for the period for which the delay had been caused in complying with the direction will be paid to her on or before 12.10.1990. In view of this statement, the Division Bench found that the application did not survive and the same was disposed of as having become infructuous In this background, the dispute has now precipitated between the parties about the continuity of service, i.e. from January, 1977 to 23.8.1988 when she was reinstated on the basis of the award dated 28.3.1988. The Assistant Municipal Commissioner, 5th Zone, Baroda has passed an order that all the grievances of the petitioner were included in Special Civil Application NO. 5497 of 1988 and this Special Civil Application had been rejected on 18.6.1992 and, therefore, her request for granting continuity of service cannot be entertained. This order dated 30.10.1996 passed by the Assistant Municipal Commissioner, 5th Zone, Baroda is under challenge in this petition. Though it is mentioned in the award dated 28.3.1988 that the relief of reinstatement is granted while denying the back wages, nothing has been said in the positive terms with regard to the continuity of service or

otherwise but the fact remains that the relief of continuity has not been denied by any specific mention as has been done for the backwages. Thus, the petitioner may have failed before the Division Bench in getting the relief of back wages for the intervening period but that does not mean the forfeiture of the continuity of the service because it is not a case of denying the continuity of service by and positive penal order. The rejection of the petitioner's special civil application no. 5497 of 1988 on 18.6.1992 only means that her claim for the back wages was not accepted by this Court nor it can be said on the basis of the order passed in Miscellaneous Civil Application No. 655 of 1988 on 28.9.1990 that everything due to the petitioner under the award had been given in facts of a given case. If the Court comes to the conclusion that the contempt proceedings are not warranted, the Court may not proceed to initiate the contempt proceedings but the mere fact that the Court does not initiate the contempt proceedings does not mean that the rights of the party if they are otherwise available to her on the basis of the award passed after adjudication would come to an end. An order of action may not be contemptuous per se, still it may be illegal order. However, every illegal order may not be a contemptuous order and, therefore, the rejection of the application in the nature of seeking contempt proceedings would not impeach upon otherwise illegal order or action. In this view of the matter, in my considered opinion, neither the rejection of the petitioner's special civil application no. 5497 of 1988 on 18.6.1992 nor the rejection of Misc. Civil Application No. 655 of 1988 in the nature of contempt proceedings on the ground of being infructuous by the Division Bench comes in the petitioner's way for claiming relief of continuity of service on the strength of the award dated 28.3.1988, if at all it is available to her on the basis of that award itself. It is, therefore, plain and simple case of interpretation of the relief granted by the Labour Court while passing the award dated 28.3.1988. By this award, the relief of reinstatement has been granted but the relief of back wages has been denied specifically and the relief of continuity of service has not been denied in any terms except that although the relief of reinstatement the word 'continuity' has

not been mentioned. It may be straightway observed that once the relief of reinstatement is granted, the continuity of service is the direct consequence rather inherent in the relief of this nature, more particularly when the Division Bench has already held that the termination was void, If the termination order was void, the meaning that in the eye of law, the relief of reinstatement has to be granted as if the impugned award had never been passed. The question of back wages is, therefore, dependent on variable factors of gainful employment during the period of enforced idleness and, therefore, in a given case, the relief of back wages may not be granted depending upon the finding on the question of gainful employment or otherwise during the period of enforced idleness. When the relief of reinstatement is granted and the continuity of service is not specifically denied, the party has to be regulated to the same position as was held by it at the time of termination. When the order of termination has been found to be void, the petition holds the relief of reinstatement with no mention of specific denial of continuity of service, the concerned workman has to be regulated to the position which was obtaining at the time of termination of her services and there is no question of denying the continuity of service for the period for which the services have been interrupted on account of an unlawful and void order."

Recently, the apex court has considered the same question in case of Gurpreet Singh and State of Punjab and others reported in 2002 (92) FLR 838. The relevant observations made by the apex court in 1 and 2 of the said judgment are reproduced as under :

"Leave granted.

The Plaintiff is in appeal against the impugned judgment of the High court of Punjab and impugned judgment of the High Court of Punjab and services stood terminated and he filed the suit for declaring the order of termination null and void. The suit was dismissed. The lower appellate court, however, on reappreciation of the materials on record, came to the conclusion that the order passed by the D.I.G. must be held to be illegal and consequently directed that the

plaintiff should be reinstated in service. Having directed so, the first appellate court categorically held that the plaintiff will not be entitled for any arrears of salary for the period for which he has not served. The plaintiff assailed the appellate decree by filing a second appeal claiming that he would be entitled to the arrears of salary. The High Court by the impugned order not only confirmed the decree of the lower appellate court that the plaintiff will not be entitled to any arrears of salary but also further added that the plaintiff will not get his continuity of service. The plaintiff therefore is in appeal before this Court.

2. Having heard the learned counsel for the parties and on examining the materials on record, we fail to understand how the continuity of service could be denied once the plaintiff is directed to be reinstated in service on setting aside the order of termination. It is not a case of fresh appointment but it is a case of reinstatement. That being the position, direction of the High Court that the plaintiff will not get continuity of service cannot be sustained and we set aside that part of the impugned order. So far as the arrears of salary is concerned, we see no infirmity in the direction which was given by the lower appellate court taking into account the facts and circumstances including the fact that the suit was filed after a considerable length of time. That part of the decree denying the arrears of salary stands affirmed and this appeal stands allowed in part to the extent indicated above."

Recently, this court has considered this aspect in the matter of Rohitkumar Atmaram Acharya versus Executive Engineer (R & B) Surendranagar reported in 2003 (1) GLH 689. In the said decision, this Court has, after considering the decision earlier decisions of this Court and of the Hon'ble apex court, has observed as under in para 8 of the judgment :

" 8. The Labour Court has granted reinstatement to the workman concerned while setting aside the order of termination. Once termination order is set aside, and reinstatement is granted, it would impliedly cover the continuity of service. It is also clear from the reading of the award that the labour court has

not granted reappointment and/or reemployment but has granted reinstatement on his original post and, therefore, in such a situation, the workman is impliedly entitled for continuity of service. This aspect has been considered by this Court in case of GSRTC v. Meliyabhai A. Vasava, reported in 2002 (3) GLR 2217 wherein this Court has observed as under in para 11;

xxx xxx xxx

Recently, in para 13 of the said decision, this Court has observed as under:

"13. Recently, the apex court has considered the same question in case of Gurpreet Singh and State of Punjab and Others, reported in 2002 (92) FLR 838. The relevant observations made by the Apex Court in 1 and 2 of the said judgment are reproduced as under: "

Therefore, in view of the aforesaid decisions of this court and of the Hon'ble Apex Court, the respondents are required to consider that the husband of the petitioner was deemed to have been reinstated in service with continuity of service and are, thereafter, required to consider the qualifying service of her husband for considering the entitlement of the present petitioner for family pension on the basis of the GR dated 17.10.1988 and if considered in that way,then, it would become as clear as day light that the husband of the petitioner was completing more than 16 years continuous service as defined under section 25 of the ID Act, 1947 entitling the petitioner to claim family pension as per GR dated 17.10.1988 after the death of her husband. The respondents were, therefore, in clear error in considering only the actual service rendered by the husband of the petitioner from 1982 to 1984 till the date on which his services were terminated and thereafter from the date on which he was reinstated in service as per the award of the labour court till the date on which he was superannuated. If the respondents would have considered that the husband of the petitioner was reinstated in service with continuity of service, then, the conclusion of the respondents would have been that he was completing more than sixteen years of service and, therefore, present petitioner is entitled for the family pension or pension as per GR dated 17.10.1988.

Therefore, considering all these aspects of the matter, according to my opinion, GR dated 17.10.88 is

fully applicable to the facts of the present case; husband of the petitioner was completing more than sixteen years continuous service as defined under the ID Act, 1947 and, therefore, the petitioner, widow of the deceased workman is entitled to claim and receive the family pension from the date of her entitlement for the same.

For the reasons recorded hereinabove, this petition is allowed. Order passed by the Deputy Executive Engineer, Guhai Sub Division No.4, Himatnagar dated 15.3.1999 which is at Annexure-A page 8 of the petition is hereby quashed and set aside and it is directed to all the respondents herein to pay the family pension or pension to the present petitioner with all due arrears from the date of her entitlement till 30th September, 2003 within the period of three months from the date of receipt of copy of this order and thereafter, to continue to make such payment of family pension or pension regularly every month without any interruption to the petitioner. Rule is made absolute accordingly with no order as to costs.

Dt. 10.9.2003 (H.K. Rathod,J.)

Vyas